

# ECJ's Approach to EU Migrants' Social Benefit Claims: Tracing Judicial Influence on German Social Policy

**MARIO MUNTA\***  
Faculty of Political Science  
University of Zagreb  
Zagreb, Croatia

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*The purpose of this paper is to investigate to what extent the European Court of Justice (ECJ) decides strategically on preliminary references in matters of access to social benefits by economically inactive EU migrants, and to what extent national courts decide to comply with ECJ preliminary rulings in these issues. In doing so, this paper attempted to contribute to a better understanding of judiciaries' impact on public policy through the EU preliminary reference procedures. Knowing that the field of social policy is highly conflict-laden, this paper assumes that the ECJ activity in this area will largely reflect a strategic balancing between deeper EU integration through case law and respect for national (fiscal) interests and competences. The paper draws on an intergovernmental, rational-choice theoretical perspective and applies it in a case study on Germany, where three cases (Dano C-333/13, Alimanovic C-67/15 and García-Nieto C-299/14) regarding the access to social benefits (i.e. special non-contributory benefits) have recently been referred to the ECJ. To draw conclusions, the author traces political circumstances, previous ECJ case law, ECJ reasoning in the case studies and final verdicts by national courts.*

**Keywords:** EU migrants, social benefit systems, European Court of Justice, preliminary references, Alimanovic, Dano, García-Nieto.

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\* Mario Munta, Fakultet političkih znanosti, Sveučilište u Zagrebu / Faculty of Political Science, University of Zagreb, Lepušićeva 6, 10 000 Zagreb, Hrvatska / Croatia, [mario.munta@fpzg.hr](mailto:mario.munta@fpzg.hr)

## INTRODUCTION<sup>1</sup>

Freedom of movement of European Union (EU) citizens and access to the social security system of host countries has become a hotly debated political issue in the EU lately, especially in the wake and aftermath of the *Brexit* vote. Fears that EU citizens from “new” member states might be migrating to other EU member states in order to take advantage of more generous social benefit systems are widespread. Absurdly, the current political debate does not center only around so-called “*welfare tourists*”<sup>2</sup>, but also includes propositions to extend exclusion periods from the social security system (i.e. in-work benefits) to EU migrant workers<sup>3</sup> and to cut back on their dependents’ rights<sup>4</sup> (i.e. childcare benefits). Interior ministers (Austrian, German, Dutch and British) have been writing letters<sup>5</sup> to the Council presidency in 2013 asking for “*practical measures to address the pressures placed on...social welfare systems*”. Although a fact-finding report by the European Commission (2013) found that the reasons to migrate are predominantly work- and family-related, the hype surrounding benefit misuse is unswerving.

This paper looks into preliminary references to the *European Court of Justice* (ECJ) in regard to the access to welfare benefit systems of host member states. The main interest of the paper lies in ECJ’s and national courts’ behavior in a salient and very sensitive policy area of EU law. The

literature seems to neglect the behavior of national courts in the aftermath of ECJ’s preliminary rulings and fails to bring forward nuanced, policy area related theories. Hence, the purpose of this paper is to investigate to what extent the ECJ decides strategically on preliminary references in a salient policy issue – access to social benefits by EU migrants, and to what extent national courts decide to comply with ECJ preliminary rulings in these issues. Since the field of social policy is highly conflict-laden, this paper assumes that the ECJ activity in this area should be the one most likely to display a strategic balancing between more integration through case law and respect for national (fiscal) interests and competences. The paper uses an inter-governmental, rational-choice theoretical perspective (Garret, 1995) and applies it in a case study on Germany where three cases, *Dano* C-333/13, *Alimanovic* C-67/15 and *García-Nieto* C-299/14), have been recently referred to the ECJ regarding the access to German basic provision benefits (a special non-contributory benefit). It traces political circumstances, previous ECJ case law, ECJ reasoning in the case studies and final verdicts by national courts to draw conclusions.

The paper continues as follows: the first section develops an actor-centered theoretical framework to study the preliminary reference procedure, followed by a short description of political, legislative and ju-

<sup>1</sup> The author would like to thank *Marie-Pierre Granger* and two anonymous referees for their helpful comments and suggestions on earlier versions of this paper.

<sup>2</sup> See Roosma et al. (2016: 178) for definitions of welfare benefit overuse and underuse.

<sup>3</sup> “All EU states oppose David Cameron’s freeze on migrant benefits”, *The Guardian*, 10 December 2015. Available at: <http://www.theguardian.com/politics/2015/dec/10/all-eu-states-oppose-david-camerons-freeze-migrant-benefits>. Accessed on: December 16 2016.

<sup>4</sup> “Thyssen slams Schäuble’s proposal to cut childcare benefits for EU foreigners”, *Euractiv*, 10 February 2017. Available at: <http://www.euractiv.com/section/social-europe-jobs/news/thyssen-slams-schaubles-proposal-to-cut-childcare-benefits-for-eu-foreigners/>. Accessed on: 11 February 2017.

<sup>5</sup> Council document 10313/13. Available at: [http://docs.dpaq.de/3604-130415\\_letter\\_to\\_presidency\\_final\\_1\\_2.pdf](http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf). Accessed on: December 16 2016.

dicial developments in EU social security policy. The second section brings forward two hypotheses with regard to ECJ and national court rulings in the preliminary reference procedure. The third section describes the methodology and the fourth section continues with a case study on Germany. Before concluding, the fifth section analyzes the key findings.

## THEORETICAL FRAMEWORK

As a supranational institution, the European Court of Justice (ECJ) has been considered as one of the engines of European integration (Pollack, 2003: 156). The competences to conduct constitutional review (Article 263 TFEU) respond to preliminary references by national courts (Article 267 TFEU) and decide on financial sanctions for infringement of EU law (Article 260 TFEU) which opens a wide array of possibilities to influence EU policy-making and transposition of EU law into domestic policies.

The impact of ECJ preliminary rulings is under special scrutiny in this article. The process starts by national judges referring questions (*preliminary references*) to the ECJ, which then issues an interpretation of EU law by means of judgment, that is, a *preliminary ruling*. Ideally, the judgment should provide a useful interpretation of the dispute in the referred case. In practice, however, the ECJ does not eschew suggesting a final determination of the case at hand. One does not have to think hard to realize the importance of studying ECJ case law. For instance, the landmark ruling in the 1979 *Cassis de Dijon case*<sup>6</sup> established the principle of mutual recognition, which became one of the bedrock principles of the European single market. Scholars have sought to trace the influence of preliminary

rulings both on EU policy-making and on the national level. Wasserfallen (2010: 1133) argued that the ECJ influences European integration once its rulings are taken up in the EU policy-making process and incorporated into new EU legislation. On the other hand, Nyikos (2003) analysed how preliminary rulings are implemented by national courts and found that in more than 96 percent of cases ECJ decisions were successfully implemented. Besides these sporadic undertakings, the field lacks more theorizing on the effects of ECJ preliminary rulings. In specific, research has failed to explain negative national court responses - instances where national courts do not implement ECJ decisions or reinterpret ECJ rulings according to their own interpretation of law. Although courts' non-compliance is allegedly rare, we still have little knowledge about the reasons why national courts do not fully cooperate in some cases. Does it happen in sensitive, crucial cases where national prerogatives are at stake, and where the risk of placing significant social and economic burden on the state is too high? Crucially, one has to remember that under the preliminary reference procedure the ECJ is not granted the right to decide on the conformity of national policies with EU law. This is reserved for the infringement procedure. It only ought to interpret EU law, but not intermeddle in factual matters in a preliminary reference (Davies, 2012: 78-9). Effectively, this gives national courts full authority to refute or ignore the ECJ's interpretation of evidence in a specific case (*ibid*).

Two distinct theoretical approaches shed some light on the role of national courts, one neofunctionalist (Mattli and Slaughter, 1995) and the other intergovernmentalist (Garret, 1995). The former acknowledges ECJ's activist role and argues

<sup>6</sup> *Cassis de Dijon* C-120/78 (1979).

that it has pursued European integration and its own institutional interest, and at the same time resisted national social and economic interests. On the contrary, it is argued that the preliminary reference procedure has opened up the possibility to influence policy areas where *“the treaty is vague or legislation is absent or incomplete”* (Hix, 2005: 136). According to this view, Article 267 and the doctrines of supremacy and direct effect have actually co-opted national courts and empowered<sup>7</sup> them to decide on issues that have traditionally been beyond the scope of their activities (Stone Sweet, 2010: 29). The latter approach introduces the strategic government perspective, claiming, first, that ECJ rulings take into account strategic interests of individual states and hence try not to run against economic interests of the member state; and second, that member states have remedies to counter adverse effects of ECJ's actions. For instance, they might seek to overrule decisions by passing new EU legislation (Conant, 2002: 192), preempt ECJ influence by modifying domestic provisions or simply proceed by not complying or transposing legislation only to a limited extent (Heidlmaier and Blauberger, 2017; Blauberger, 2012; Panke, 2007: 849). It is reasonable to assume, in this approach, that national courts would act as buffer-zones between the ECJ and national governments in instances where the ECJ rulings have serious implications for the future of a policy, in the sense of placing too high a burden (adaptational, financial or administrative) on the nation state. On the other hand, rather than being buffer-zones, an alternative perspective might suggest that national courts strategically use the preliminary reference procedure (by deciding to refer or not to refer cases to the ECJ, by dictating

which questions are posed to the ECJ etc.) as an additional leverage to challenge official government policy.

The following section takes stock of the rational choice assumptions in the intergovernmentalist approach and tries to come up with tentative scope conditions as to when national courts are to be expected to thwart ECJ preliminary rulings. The section focuses on EU social security policy and builds two hypotheses.

### OVERVIEW OF THE POLITICAL, JUDICIAL AND LEGISLATIVE DEVELOPMENTS

Social policy is one of the first policy areas to have been coordinated at the EU level, but at the same time, it remains one of the most contested. The governance of access to social benefits of a host member state for EU migrant workers, job-seekers and non-active EU citizens is regulated through *EU regulation on the coordination of social security systems* (EC 883/2004), making it the only social policy falling under *“hard coordination”* (Copeland and ter Haar, 2015: 201). Sindberg Martinsen (2015) identifies three phases of EU social integration: negative social integration, positive social integration and the Open Method of Coordination (OMC). Already the Rome Treaties of 1958 featured anti-discrimination rules and the principle of freedom of movement for workers. Without a formal social policy title, these early provisions had in mind the proper functioning of the internal market and abolition of nationality-based discrimination in work matters. The treaty provisions called for coordination of national social security systems to ensure transferability and aggregation of workers' benefits in host Member

<sup>7</sup> See Weiler's (1991) *“judicial empowerment”* thesis.

States (Article 48 TFEU). Other formal competencies of the EU to engage in social regulation followed only later (*positive integration*) in order to mitigate social problems generated by market forces. Legislative competencies fall into three areas of social regulation: standards for health and safety of workers, working conditions, and equal treatment at the workplace (Falkner, 2017: 274). Still, in other social fields such as social protection, welfare provision, wages and employment policy, Member States retain policy-making responsibilities, whereas the EU encourages coordination through soft law (*OMC*).

Member States have traditionally conditioned access to national welfare systems by nationality requirements (Penning, 2012: 308). With Council Regulation 1612/68 laying down the rights of EU migrant workers, and Council Regulation 1408/71 specifying access to social security benefits for EU migrant workers, Member States were forced not to discriminate between nationals and EU migrant workers, both regarding contributory and non-contributory social security schemes<sup>8</sup>. Social assistance<sup>9</sup>, on the other hand, was exempt from the provisions. Labor shortage was a driving force for more integration in this field, and concerns about equal treatment of EU migrants and their families were therefore only of pragmatic nature. Additionally, migrant workers were

allowed to export<sup>10</sup> these benefits to other member states. However, the right to transfer benefits prompted legal disputes and political responses. In the *Frilli*<sup>11</sup> case, the ECJ argued that Belgium could not restrict non-contributory guaranteed income for older persons to Belgian nationals only. In another case<sup>12</sup>, the ECJ ruled in favor of an Italian national who, upon returning home from France after retirement, requested a means-tested pension from France. France persistently refused to comply, sparking a political debate at the EU level. Finally, Member States unanimously voted in the Council to amend<sup>13</sup> Regulation 1408/71 by means of introducing a list of so-called '*special non-contributory benefits*'<sup>14</sup>, exempting these from exportability.

This legislative overrule was followed by the introduction of the *European citizenship* concept in the *Treaty of Maastricht*, extending the right to move and reside freely within the territory of the EU Member States (Article 20 TFEU), and prohibiting discrimination on grounds of nationality in regard to provisions in the Treaty (Article 18 TFEU). However, this right to "move and reside freely" comes with strings attached in the form of "limitations and conditions" referred to in Article 21(1) TFEU. Again, ECJ case law was crucial in specifying how the relationship between free movement of EU citizens and their access to social benefits should be interpreted. In

<sup>8</sup> Article 4, paragraph 2, Council Regulation 1408/71.

<sup>9</sup> Initially, the difference between social assistance and social security was vague in the Regulation 1408/71. Case law clarified that social assistance refers to benefits where eligibility is determined via '*individual assessment such as means testing*' (Conant, 2002: 180).

<sup>10</sup> The exportability of social benefits meant that EU migrant workers were not required to reside in the host country in order to receive the benefit (for instance, pensions), but could have them 'exported' to another member state.

<sup>11</sup> *Frilli* C-1/72 (1972).

<sup>12</sup> *Giletti et al.* C-381/85 (1987).

<sup>13</sup> Council Regulation 1247/92.

<sup>14</sup> Those benefits '*because of its personal scope, objectives and/or conditions for entitlement, have characteristics both of the social security legislation...and of social assistance*' (Council Regulation 883/2004, Article 70(1)). They are supplementary, substitute or ancillary in securing a minimum subsistence income. (*ibid.*, Article 70(2)(a)(i)).



*Martinez-Sala*<sup>15</sup>, the ECJ, for the first time, successfully invoked Article 18 in a judgment on access to child-raising allowances for an unemployed Spaniard living in Germany. The right to move and reside freely was then codified in secondary law with the *Citizenship directive*<sup>16</sup>, laying down principles of equal treatment in matters pertaining to social benefits. Non-active citizens were allowed to reside freely in a member state for up to three months, and could not access social assistance during that period (Article 24(2)), but could prolong residence to more than three months under the condition of having "sufficient resources" to provide for them and their family, and not becoming "a burden on the social assistance system of the host Member State" after examining personal circumstances on a case-by-case basis (Article 7(1(b))). However, it was agreed that expulsion cannot be an automatic consequence of requesting social assistance (Article 14(3)). Furthermore, legislation on the coordination of social security systems was updated with Regulation 883/2004. The main purpose of this legislation is to guarantee equal treatment of EU migrants within the social security system of the host country in matters related to a variety of social security branches (Article 3(1)). However, the regulation does not apply to social and medical assistance schemes.

The ECJ, although opening up social assistance benefits<sup>17</sup>, student maintenance grants<sup>18</sup>, and benefits to facilitate labor market access<sup>19</sup> to economically inactive workers, remained cautious to apply the prohibition of discrimination unconditionally. In each case, the literature agrees, the judici-

ary attempted to "strike a fair balance" between individual rights and the financial interests of member states, that is their welfare systems (Verschuere, 2014; Wasserfallen, 2010). To be eligible for welfare benefits, non-active EU migrants should not become an unreasonable burden to public finances (*Grzelczyk*), should display a genuine link with the labor market of the host country (*Collins*; *Vatsouras & Koupatantze*) or should showcase "a certain degree of integration" into the society of the host country (*Bidar*). The balance seems to reflect the awareness of the high politicization of the field, instances of legislative overrule and incomplete transposition in a policy deemed to display "contained compliance" (Heidlmaier and Blauburger, 2017: 2; Conant, 2002) as a frequent political response to judicial activism.

From what has been said, EU legal scholars agree that, in the early phase of EU social policy, ECJ case law has promoted social integration and individual social rights, and that the ECJ has acted as a motor of integration in the field of social policy as well (Heidlmaier and Blauburger, 2017; Horsley, 2013: 931; Stone Sweet, 2011; Weiler, 1994). To some authors, ECJ's interpretive power even amounts to a 'quiet revolution' (Weiler, 1994: 517). The ECJ has helped in building and sustaining EU citizenship rights in regard to non-discrimination, gender equality and welfare rights.

## Hypotheses

This short description of judicial and political responses to EU citizens' access to social benefits also indicates that the coor-

<sup>15</sup> *Martinez-Sala* C-85/96 (1998).

<sup>16</sup> Directive 2004/38 of the European parliament and the Council.

<sup>17</sup> *Grzelczyk* C-184/99 (2001).

<sup>18</sup> *Bidar* C-209/03 (2005).

<sup>19</sup> *Collins* C-138/02 (2004), and *Vatsouras & Koupatantze* C-22/08 (2009).

dination of social security systems is a politically sensitive and salient area in which Member States bear the costs of judicial activism. It also seems that the judiciary is reluctant to impose significant financial burden on national welfare systems so as not to provoke national governments' discontent and legislative retaliation. Moreover, rulings in ECJ case law indicate a potentially dangerous development with proliferation of ambiguous concepts such as "*genuine links*", "*unreasonable burdens*" and "*certain degree of integration*", offering national governments a *carte blanche* to arbitrarily define conditions on a case-by-case basis. This in turn has the potential to add another layer of "*legal uncertainty*" in the sphere of EU migrants' access to social benefits (Blauberger and Schmidt, 2014: 2). This article shares the opinion of a group of scholars who claim that the "environment for the CJEU as an engine of integration has changed severely" (Werner, 2016: 1450). The European project, especially following the Treaty of Maastricht, has become increasingly politicized, the public visibility of EU activities has increased, and the integration process is facing opposition from Eurosceptic forces. In that regard, ECJ's activist behavior in the social sphere has fallen victim to the 'end of honeymoon phase, as Weiler (1994) calls it. The rest of the article will examine three recent cases in which the ECJ had to construct a preliminary ruling on issues of social benefit access to EU migrants. The assumption is that the unfavorable socio-economic environment in the EU (following the Euro crisis, migration crisis, and sovereign debt crisis) will act as a deterrent to ECJ activism. Social policy, currently being a politically sensitive field that implies high (re-) distributive effects, offers the perfect case to test the constrained action thesis of ECJ activity in the field. Contrary to the view

of an activist judiciary, this article adopts a 'constrained court view', according to which ECJ's interpretive autonomy is constrained by political and economic conditions in the immediate environment. In other words, this follows an intergovernmental logic (Cotter, 2017:12) in which the ECJ is expected to be responsive to the interests and preferences of economically and politically powerful Member States. It will act with much 'self-restraint' (Sindbjerg Martinsen, 2015: 5). The Court operates in an environment in which both national courts and governments have sufficient room for maneuver to disregard or counter an adverse preliminary ruling. How are national courts supposed to react according to this perspective? If the intergovernmental, 'constrained' view is to hold true, national courts should readily accept an ECJ ruling that does not impose new budgetary obligations on the Member States or implies a significant shift in national responsibilities.

Based on the aforementioned developments, and drawing on rational-choice institutionalism, the following hypotheses are formulated:

**H1:** *In the areas of social policies that are regarded as sensitive in national capitals, and in which expansive ECJ interpretations have potentially high budgetary implications on national welfare systems, ECJ case law will strategically shy away from such interpretations.*

**H2:** *In ECJ preliminary rulings that balance between individual and state interests, national courts will not reinterpret or refuse to implement the ruling, but will comply with the judgment instead.*

## METHODOLOGY

The empirical part of this paper will present a case study of Germany concern-

ing three ECJ preliminary ruling on access to basic provision benefits by economically inactive EU migrants (including job-seekers) - the *Dano case*<sup>20</sup>, the *Alimanovic case*<sup>21</sup> and the *García-Nieto case*<sup>22</sup>. Concerning case selection, Germany was chosen as a potential crucial case (Gerring, 2006: 115) that has the highest potential to elucidate the theoretical assumption of this paper. As it will be shown, the three cases were politically highly controversial even beyond the German context. They were to signal the sentiment of the Court toward future case law on matters of EU citizenship, more specifically in this case on the access to social benefits by EU migrants in general. Furthermore, for Member States an unfavorable ECJ ruling might have a great potential to distort national policies towards EU migrants. Hence, drawing on the intergovernmental and rational choice tradition, Germany will be regarded as a most-likely case to display ECJ's reluctance to act excessively activist in politically-laden and salient policy issues, and national courts' hesitance<sup>23</sup> to run against a ECJ ruling where the finding balances between individual and state interests or does not go against the interest of the national government.

The paper uses process tracing<sup>24</sup> (see: Stone Sweet, 2010) to identify and disentangle national governments' positions,

characteristics of the policy field, the general political and societal debate surrounding the cases, ECJ's rulings on the individual cases and the reactions to the rulings both at the level of national judiciary and political and societal actors. Process-tracing is a within-case method that *'attempts to identify the intervening causal process – the causal chain and causal mechanism – between an independent variable (X) and the outcome of the dependent variable (Y)'* (George and Bennet, 2005 in: Beach and Pedersen, 2013: 1). Here, the mechanistic understanding of causality implies that the researcher unveils the black-box of causality and studies the complex *'system of interlocking parts that transmits causal forces from X to Y'* - causal mechanisms (Beach and Pedersen, 2013: 29). This way, observable implications of the proposed theoretical assumptions will be traced, and conclusions will be drawn based on the theoretical-empirical fit. Since causal mechanisms cannot directly be observed, we look for observable implications, which are *"case-specific predictions of what observable manifestations each of the parts of the mechanism should have if the mechanism is present in the case"* (Beach and Pedersen, 2013: 14). They refer to predicted empirical evidence that can be derived from a theory (Rohlfing, 2013: 609). In that sense, attention will be paid to the percep-

<sup>20</sup> *Dano* C-333/13 (2014).

<sup>21</sup> *Alimanovic* C-67/15 (2015).

<sup>22</sup> *García-Nieto* C-299/14 (2016)

<sup>23</sup> At this point, it should be noted that a critical reader would expect national courts not to be referring cases to the ECJ in the first place, if the assumption was to hold truth. However, I argue that the general climate of judicial uncertainty and individual assessment that has marked the field leaves national courts clueless on how the ECJ will interpret EU's primary and secondary law in this matter. Since it is not reasonable to expect overly activist judgments in social benefit cases, I argue that national courts could not be guided by heuristics in regard to ECJ's reactions, and therefore would not shy away from preliminary references.

<sup>24</sup> A disclaimer is needed here. This paper does not pretend to use process tracing in the methodologically nuanced and rigorous fashion proposed in social sciences these days (see Beach and Pedersen, 2013; Rohlfing, 2013). In ideal terms, process-tracing would track causal mechanisms leading to certain outcomes, and make use of comparative hypothesis testing to discern uniqueness and certainty of observable implications for each hypothesized causal pathway. This piece uses the concept more loosely.

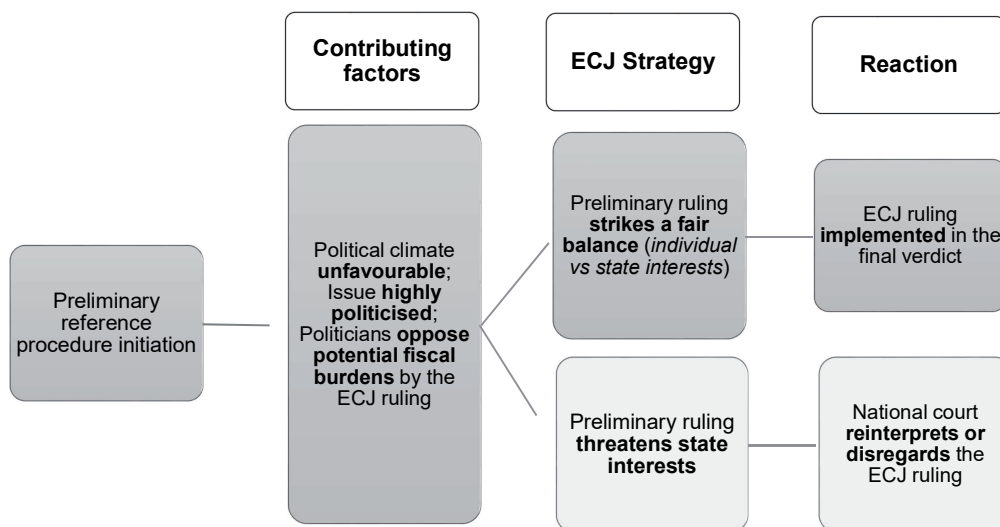


tions of national (fiscal) interests, ECJ's reasoning and national courts' responses. An explicit reference in the ECJ ruling to the potential fiscal burden that an expansive interpretation might cause will be regarded as highly confirmatory evidence. This evidence would boost our confidence in the validity of the hypothesis, but failure to find explicit reference would not critically undermine our confidence (*smoking gun test*). Instances where national courts' final verdicts would run against state interests, whilst laying down an explicit individual-rights based reasoning, will be considered as discomfoting evidence for hypothesis 2. This would annul confidence in the validity of the hypothesis (*hoop test*). Partially

following Nyikos (2003), national courts' responses in this paper will be coded as full compliance, reinterpretation<sup>25</sup> of the ruling or non-implementation. The data includes official documents, reports, government opinions, newspaper excerpts, expert opinions and secondary literature. These sources form the basis for identifying observable implications. Figure 1 displays the basic causal chain that builds on previously explicated theorization (see *above*). The shaded boxes include the hypothesized behavior by the ECJ (*H1*) and national courts (*H2*) in conflict-laden circumstances in which the political elite and the general political climate are disinclined towards additional fiscal burdens.

Figure 1

*Causal chains (hypothesized) in the preliminary reference procedure*



<sup>25</sup> Reinterpretation refers to instances where the national court modifies the final verdict compared to the ECJ ruling, but still acknowledges the validity of the ECJ ruling (Nyikos, 2003: 407).

## CASE STUDY – GERMANY

Germany had a rich history of defying EU law on social policy and denouncing ECJ interference, especially during the Kohl administration in the early 1990s<sup>26</sup>. Most of the contemporary controversy, however, revolves around access to social benefits by economically inactive EU migrants and their dependents. The issue gained public attention with high post-accession immigration from Romania and Bulgaria, and the popular fear that they might misuse the German welfare system. Discussions on “*welfare tourism*” were further accentuated by the fact that EU migrants gain immediate access to child benefits<sup>27</sup> in Germany (Blauberger and Schmidt, 2014: 5). As a result, the association of German cities (*Deutscher Städtetag*) issued a position paper expressing concern with the financial and societal challenge these migrants pose to municipalities, and requesting action on the states’, federal and EU-level (Association of German Cities, 2013). A number of parliamentary hearings were held on the issue of EU migrants. Moreover, a Committee of State Secretaries (*Staatssekretärssausschuss*) was created to come up with solutions to challenges in the social security system. In a 2014 interim report, the Committee pledged to speed up financial support to burdened communities and suggested stricter residence requirements for job-seekers (German Government, 2014).

When in 2005 the notorious Hartz IV<sup>28</sup> Act became effective, German labor mar-

ket policies shifted radically (Kemmerling and Bruttel, 2006: 96). What previously consisted of (contribution-based and income-related) unemployment benefits, and (tax-financed and means-tested) unemployment assistance and social assistance, was now transformed into Unemployment benefit I, which is income-based and limited to 12 months, and Unemployment benefit II, effectively merging unemployment assistance and social assistance into one system – the *basic provision benefit*<sup>29</sup>, independent of former income and fixed at €345 per month. Former workers who used to receive income-related and unlimited unemployment assistance, were now granted a fixed, almost equally (un)generous allowance as the former social assistance. The purpose of the basic provision is to cover subsistence costs and to facilitate employment. EU law recognizes the German basic provision benefit as a special non-contributory benefit. It is namely the access to these basic provision benefits that was discussed in the *Dano case*, the *Alimanovic case* and the *García-Nieto case*. Germany had a vested interest in containing access to social benefits to inactive EU migrants precisely because such action would risk fuelling fiscal and political tension. In all of the three cases, the German government submitted an official opinion to the ECJ along with a number of other Member States who opposed an expansive reading of EU migrants’ social rights. From a process-tracing perspective, the described

<sup>26</sup> See Conant (2002) and Panke (2007).

<sup>27</sup> “Union fordert strengere Kindergeld-Regeln für EU-Ausländer”, *Frankfurter Allgemeine Zeitung*, 3 May 2014. Available at: <http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/europa-wahlkampf-kindergeld-fuer-eu-auslaender-12921353.html>, and: “Kindergeld für EU-Ausländer kostet Milliarden”, *Frankfurter Allgemeine Zeitung*, 11 May 2014. Available at: <http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/sozialleistungen-kindergeld-fuer-eu-auslaender-kostet-milliarden-12934386.html>. Accessed on: January 3 2017.

<sup>28</sup> Officially called “*Act for Modern Services on the Labour Market*” (*Viertes Gesetz für moderne Dienstleistungen am Arbeitsmarkt*).

<sup>29</sup> Originally called “*Grundsicherung für Arbeitsuchende*”.

intensity of opposition within the realm of German politics offers sufficient proof that the first link in the causal chain (see Figure 1) was indeed present – the political climate was extremely unfavorable in the run-up to the ECJ rulings due to fiscal and political concerns raised on multiple levels of German political institutions.

### The Dano case

The *Dano case* was referred to the ECJ by the German Social Court in Leipzig and it concerned a dispute between two Romanian nationals – Elisabeta Dano and her son Florian who were granted an unlimited residence permit in Germany, and the Jobcenter Leipzig. Ms Dano was economically inactive and did not seek employment in Germany, but applied for the basic provision benefit twice. Her request was declined twice by the Jobcenter Leipzig. The Jobcenter drew on provisions in the German social code which deny access to social assistance to foreign nationals who reside in Germany with the '*sole purpose of obtaining assistance or searching for employment*' (§23(3) *Sozialgesetzbuch XII*). In a nutshell, the Social Court in Leipzig asked the ECJ whether 1) Article 4 of the Regulation 883/2004 on the coordination of social security systems, which established a principle of equality of treatment between nationals and EU migrants, and whether 2) Article 18 and Article 20 of the TFEU regarding EU citizenship and non-discrimination, applied in the cases of persons who request special non-contributory benefits under Regulation 883/2004. In short, the ECJ ruled that Ms Dano could not resort to the principles of equal treatment and non-discrimination as laid down in the *Citizenship directive* and Regulation 883/2004 (paragraph 83). The Court argued that, under Article 7(1)(b) of the

*Citizenship directive*, EU citizens who are economically inactive, such as Ms Dano, could reside in another Member State for longer than three months only on the condition of having sufficient resources so as not to become an unreasonable burden on the social assistance system. This way, the ECJ made full recourse to Article 21(1) TFEU which indicates that the right of inactive EU nationals to reside freely in another Member State is bound with fetters. For them, residing in another Member States is not unconditional and is 'subject to the limitations and conditions laid down in the Treaty and by the measures adopted for its implementation'. The *Citizenship directive* prescribes in that regard that residence for inactive EU migrants is conditioned by having 'sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State' (Article 7(1)(b)). The Court employed a broad interpretation of '*social assistance*', subsuming Dano's request for special non-contributory social benefits within the meaning of '*social assistance*' set within the *Citizenship directive*. Under EU law (Article 70, Regulation 883/2004), it is solely the Member States' competence to specify conditions for access to special non-contributory cash benefits – therefore, these conditions do not constitute EU law. The Court accepted Member States' right to refuse social benefits to non-active EU migrants who do not have sufficient resources to satisfy the terms of a residence claim (paragraph 78). Hence, the implication was that applying for basic provision signals insufficient resources to provide for oneself and therefore preempts any non-discrimination claims by virtue of not fulfilling the '*sufficient resources*' condition

to reside freely under the *Citizenship directive*. Still, the ECJ requested individual/case-by-case assessments of the financial situation of each person concerned (paragraph 80).

The *German Social Court* in Leipzig implemented the ECJ ruling without any further ado, and the long-awaited decision was welcomed by German politicians<sup>30</sup> and the media<sup>31</sup> alike. The judgment was hailed outside Germany as well, notably amongst conservative MEP's<sup>32</sup> and the British conservatives. David Cameron called the decision '*simple common sense*'<sup>33</sup> as he was encouraged by the judgment to urge for additional curtailing of social benefit rights to EU migrants amidst the scheduled referendum to leave the EU.

### *The Alimanovic case*

In December 2013, the German *Federal Social Court* (*Bundessozialgericht*) made a request for a preliminary ruling in the dispute between Jobcenter Berlin Neuköln and Nazira Alimanovic and her three children, all Swedish nationals<sup>34</sup>. Ms Alimanovic and

her daughter Sonita were temporary employed between June 2010 and May 2011. Afterwards, they were both paid basic provision for job-seekers under *German Social Code* between December 2011 and May 31 2012, after which the Jobcenter withdrew<sup>35</sup> the benefits. The referring court asked whether the principle of equal treatment in Article 4 of the Regulation 883/2004 was breached. The ECJ first noted, referring to the judgment in *Dano*, that the benefits at issue (Unemployment benefit II for job-seekers) do constitute social assistance<sup>36</sup>, and are not meant to '*facilitate access to the labor market*' (paragraph 46). It also recalled on the conclusions in *Dano* that equal treatment is applicable only when the EU migrant is a lawful resident. Under EU law<sup>37</sup>, Ms Alimanovic and her daughter had the right to retain the status of a worker for at least six months after employment, and have access to social assistance for at least six months<sup>38</sup>. They did so, but were denied entitlements after the expiration date. Therefore, in the opinion of the Court, the Member State had the right to rely on Article 24(2) in the *Citizenship directive* to

<sup>30</sup> "EuGH-Urteil zu Hartz IV: Europa bleibt offen - mit Einschränkung", *Der Spiegel*, 11 November 2014. Available at: <http://www.spiegel.de/wirtschaft/soziales/hartz-iv-eugh-urteil-zur-sozialhilfe-staerkt-europa-a-1002291.html>. Accessed on: January 8 2017.

<sup>31</sup> "Freizügigkeit, die sie meinen", *Süddeutsche Zeitung*, 4 February 2015. Available at: <http://www.sueddeutsche.de/wirtschaft/sozialleistungen-fuer-eu-buerger-freizuegigkeit-die-sie-meinen-1.2333680>. Accessed on: January 9 2017.

<sup>32</sup> "EU judges rule against 'welfare tourists' in nod to Cameron", *Euractiv*, 12 November 2014. Available at: <http://www.euractiv.com/sections/social-europe-jobs/eu-judges-rule-against-welfare-tourists-nod-cameron-309929>. Accessed on: January 9 2017.

<sup>33</sup> "EU 'benefit tourism' court ruling is common sense, says Cameron", *BBC*, 11 November 2014. Available at: <http://www.bbc.com/news/uk-politics-30002138>. Accessed on: January 9 2017.

<sup>34</sup> They were all granted permanent residence in Germany in 2010.

<sup>35</sup> In December 2011, the German government used its right under international law to issue a '*reservation*' to the application of the *European Convention on Social and Medical Assistance* (1953) concerning basic provision benefits under the second book of the German Social Code (paragraph 4). This change had an effect on the decision made by the Jobcenter to withdraw benefits in the *Alimanovic case*.

<sup>36</sup> In the opinion of the Court, social assistance in that sense refers to '*all assistance schemes...to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family*.' (paragraph 44).

<sup>37</sup> Article 7(3)(c) of Directive 2004/38.

<sup>38</sup> This was confirmed in judgments in *Vatsouras & Koupatantze* C-22/08 and C-23/08).

deny access to social assistance during the first three months of residence and longer to EU migrants residing in Germany for the sole purpose of seeking employment (paragraphs 57-8). Still, unlike the *Dano* case, the Court ruled that in the cases where residence places unreasonable burden on the social assistance system of the state, “no... individual assessment is necessary in circumstances such as those at issue” before adopting expulsion measures (paragraph 59) since it is believed that the period in which Ms Alimanovic retained the status of a worked added to “a significant level of legal certainty” (paragraph 61). Hence, Ms Alimanovic could be expelled without a proportionality test.

The ECJ judgment was seen in the media as a logical extension to the *Dano* judgment<sup>39</sup>. The final verdict<sup>40</sup> by the *Federal Social Court* (FSC) in the *Alimanovic* case was, however, announced in December 2015. The FSC resorted to a reinterpretation of the case. Although reiterating ECJ's judgment that EU migrants without residence permit have no claim on basic provision under the German Social code, this allegedly does not exclude them from all types of social assistance, hence they do have a right to social assistance (*Sozialhilfe*) as laid down in the 12th book of the

Social Code (SGB XII)<sup>41</sup>, after a six-month residence period (so called “solidified residence”). EU migrants would effectively become eligible for social assistance after a period of “solidified residence”. The FSC relied in its verdict on a judgment by the *German Federal Court* (GFC) in 2012 on the undeniable right of asylum seekers to a “fundamental right to a humanely existential minimum”<sup>42</sup>. It also found the *European Convention on Social and Medical Assistance* applicable where possible, but only in regard to subsistence help (*Lebensunterhalt*) under the 12th book of the *German Social Code*. The divergence from the ECJ ruling was received with a mixture of great surprise in the media<sup>43</sup>, confusion among professionals<sup>44</sup>, and anger among municipalities<sup>45</sup> who are to bear the financial burden of providing social and health assistance to EU migrants. What remained obscure at that time was in which form the social and medical assistance was to be granted and whether it could only be granted for an interim period before deportation. This unusual situation in which on the one hand, the ECJ judgment was in line with the government's expectations, and on the other the final verdict of the FSC engaged in a reinterpretation, sparked further political controversy. Some lower courts, mu-

<sup>39</sup> “Grundsatzurteil: EuGH entscheidet über Hartz IV für EU-Ausländer”, *Der Spiegel*, 15 September 2015. Available at: <http://www.spiegel.de/wirtschaft/soziales/hartz-iv-fuer-eu-auslaender-grundsatzurteil-erwartet-a-1052812.html>. Accessed on: January 10 2017.

<sup>40</sup> *Alimanovic* B 4 AS 43/15 R (2015).

<sup>41</sup> According to §23 paragraph 1 of the *German Social Code* (SGB XII), access to subsistence assistance, assistance in course of sickness, pregnancy, maternity or care, is dependent only on “factual residence”.

<sup>42</sup> Article 1, paragraph 1 of the *Basic Law of the Federal Republic of Germany* guarantees human dignity to every person unconditionally.

<sup>43</sup> “Am Minimum”, *Süddeutsche Zeitung*, 3 December 2015. Available at: <http://www.sueddeutsche.de/politik/urteil-am-minimum-1.2766265>. Accessed on: January 16 2017.

<sup>44</sup> “Minimalleistungen auch ohne Aufenthaltsrecht”, *Legal Tribune Online*, 4 December 2015. Available at: <http://www.lto.de/recht/hintergruende/h/bsg-urteil-b4as4415r-sozialleistungen-eu-buerger-ohne-aufenthaltsrecht/>. Accessed on: January 16 2017.

<sup>45</sup> “Milliardenkosten durch Sozialhilfe für EU-Ausländer?”, *Frankfurter Allgemeine Zeitung*, 4 December 2015. Available at: <http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/milliardenbelastung-fuer-staedte-und-kreise-durch-sozialhilfe-fuer-eu-auslaender-13949002.html>. Accessed on: January 16 2017.



municipalities and districts (who are the competent authorities for SGB XII benefits) decided to actively 'contain the influence of ECJ jurisprudence by not implementing the FSC judgment and denying access to benefits' (for an overview: Heidlmaier and Blauberger, 2017: 16-17). The German government could not let this instance of 'outright non-compliance' (Blauberger, 2012: 111) become the new normal, and it decided to break the legal uncertainty by revising the social legislation roughly one year after the FSC judgment. According to the new rules, EU citizens who migrate to Germany and have no right to benefits under Book II of the German Social Code, cannot become eligible to long-term social assistance under Book XII during the first five years. They would nonetheless be entitled to a temporary benefit of a maximum duration of one month to facilitate the exit from the country (FMLS, 2016).

### *The García-Nieto case*

In the *García-Nieto case* (C-299/14), the Higher Social Court of the State of North Rhine-Westphalia sent a request for a preliminary ruling to the ECJ on 17 June 2014 on a proceeding between the Employment Centre for the district of Recklinghausen and the Peña-García family – all Spanish nationals. The Employment Centre had refused to issue a basic provision benefit under Book II of the German Social Code. Ms García-Nieto and Mr Peña-García lived together in Spain, but never married. After joining Ms García-Nieto and her daughter in Germany, Mr Peña Cuevas and his son applied for subsistence benefits. Mr Peña Cuevas did not work, and living expenses were covered by Ms García-Nieto's salary. At the time Mr Peña Cuevas applied for the subsistence benefit, he was residing in

Germany for less than 3 months, which, according to the Book II of the Social Code, automatically disqualified both him and his son from entitlement. The first question that was referred to the ECJ on whether the special non-contributory benefits of Regulation 883/2004 fall within the scope of the equal treatment principle in the same regulation largely resembled the question previously asked in the *Dano case*. Since the Court answered affirmatively to that question, the second question applied, asking whether the principle of equal treatment in special non-contributory benefits can be limited by Article 24(2) of the Citizenship directive which allows the host country to deny access to social assistance to inactive EU migrants during the first three months of residence. The Court found that, similar to the *Dano* and *Alimanovic* cases, the meaning of special non-contributory cash benefits (the basic provision) also constitutes 'social assistance' (Para 37). Having established the relationship between the Citizenship directive and Regulation 883/2004 on the coordination of social security systems, the Court ruled that Germany has the right to deny entitlement to those benefits to non-German EU citizens (Para 53). It was concluded that Mr Peña Cuevas lawfully resided in the territory of Germany, as no conditions apply to residence for the period of up to three months (Para 42). However, Member States can rely on the derogation in Article 24(2) of the Citizenship directive which gives them the right not to issue social assistance during the first three months of EU migrants' residence (Para 43).

The Higher Social Court of the State of North Rhine-Westphalia accepted and implemented the ECJ preliminary ruling. Legal commentators of recent cases (Crocì, 2016; Haag, 2016; Kramer, 2016) agree that the *García-Nieto judgment* largely confirms previous restrictive interpreta-

tions from *Dano* and *Alimanovic* which now *de facto* and *de jure* confine social citizenship to inactive migrant EU citizens.

## ANALYSIS

Recently, the Council of the European Union discussed amending Regulation 883/2004 on the coordination of social security systems in the light of the recent ECJ ruling (COREPER, 2017). Member States discussed how to codify case law (“in full, partially or not at all”) on access to social benefits by economically inactive EU migrants. The fact that Member States could not agree on a compromise solution on how to codify this case law, and that it was decided not to codify it, only illustrates how contested the issue of access to social benefits in host Member States is. Countries that are net-recipients of EU migrants and that have more generous welfare systems would generally be on the losing side of a more liberal interpretation of EU migrants’ social rights. This is why, in general, the three ECJ judgments were welcomed in those Member States. In contrast to social integration activism of previous decades, the ECJ has in recent years established a restrictive understanding of both free movement rights and rights to access a host Member State’s welfare system. The *Dano*, *Alimanovic* and *García-Nieto* have solidified this trend that virtually erects a wall between economically inactive EU migrants and host countries’ welfare systems. Once regarded a pioneer in developing a “doctrine of EU social citizenship” (Heidmaier and Blauburger, 2017: 4), the ECJ has now engaged in a “roll back of decades of citizenship construction” (O’Brien, 2016: 938). To fully understand the extent to which the ECJ has shaped the understanding of entitlement of non-active EU migrant citizens to social assistance,

two aspects of the ECJ reasoning need to be observed – one related to the meaning of special non-contributory benefits and the other to the application of the freedom of movement principle. With regard to the former, the ECJ had to establish the scope of meaning of the ‘social assistance system’ concept referred to in Article 7(1)(b) of the Citizenship directive. According to Article 7(1)(b), non-active EU citizens could reside in another Member State for more than 3 months only if they had “sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State...”. In all three of the German cases, the benefit under dispute was a ‘basic provision benefit’. This measure has a dual character according to German law – on the one hand, to facilitate access to the labour market, and on the other, to enable a life in dignity. According to EU social security coordination law, this measure constitutes a so-called special non-contributory benefit. By definition, these types of benefits have “a dual character between social ‘security’ and social ‘assistance’...” (Sindbjerg Martinsen, 2015: 88), being both a tool for covering subsistence costs financed through general taxation, and a measure to ease integration into the labour market. In all three judgments, the ECJ contended that the meaning of social assistance can be extended to the basic provision benefit. This is not surprising given the history of the dispute over special non-contributory benefits. Owing to governments’ concerns, a list of special non-contributory benefits was drawn and inserted in the social security coordination regulations to prevent exportability of such benefits, as Member States insisted on the principle of territoriality to be applied. Knowing how politically laden this issue was, the ECJ opted for a broad understanding of social assistance in

the three cases. This reasoning was based on a previous judgment in the *Brey case* (C-140/12) in which the ECJ asserted that the concept of social assistance “must be interpreted as covering all assistance introduced by the public authorities...that can be claimed by an individual who does not have resources sufficient to meet his own needs and the needs of his family” (Para 61). The same case has anchored the problem over access to social assistance into the freedom of movement debate and the right of residence. In the *Brey case*, as well as in the three German cases, the ECJ used Directive 2004/38 (Citizenship directive) to establish the right of residence, on the outcome of which it then depends whether the individual is entitled to equal treatment in respect to social assistance. Each time the ECJ rejected requests for social assistance with reference to Article 7(1)(b) of the Citizenship directive. Passing the residence requirement has grown into a watershed for social assistance claims by non-active EU citizens migrating to another Member State.

The first hypothesis, that the ECJ preliminary rulings in social benefit issues would avoid placing high financial burden on member states, but rather leave ample room for maneuver to national authorities, was confirmed in all three cases. As described in the previous section, “*welfare tourism*” became a hot topic in Germany and the rest of Europe and could hardly be overseen by ECJ judges<sup>46</sup>. It is reasonable to assume that the Court acted strategically and did not want to add fuel to the fire, hence it continued balancing between individual claims and national core competences. The fact that the Court put forward a broad definition of social assistance<sup>47</sup>,

applying the residence requirement of the *Citizenship directive* to special non-contributory benefits in Regulation 883/2004, indicates a tendency not to intimidate national governments. From a process-tracing point of view, strong confirmatory evidence was found which suggests that the ECJ had a high regard for budgetary concerns in Germany. In all three cases, the ECJ explicitly reasoned that residence conditionality serves the purpose of preventing economically non-active EU migrants from becoming an unreasonable burden on the social assistance system of the host country, and that any other conclusion would run against the purpose of the Citizenship directive (Dano, Para 74; Alimanovic, Para 50; García-Nieto, Para, 39). This evidence is the *smoking-gun* that confirms the ECJ's intention with the restrictive interpretation of EU law was to insulate national welfare systems from “any abuse or excessive pressure” (Crocì, 2016). This confirms the expectations that the ECJ will be a constrained actor operating with “current political and financial circumstances in Member States” (Haag, 2016) in mind.

The second hypothesis was, however, not confirmed. Although in the *Dano* and *García-Nieto* cases the domestic court readily accepted ECJ's interpretation of EU law, in *Alimanovic* the Federal Social Court deflected from the preliminary ruling. In process-tracing, such evidence is considered to be strongly disconfirming in respect to the hypothesized claim which crucially compromises our confidence that national courts will adjudicate with governmental interests in mind. It seems that the developments in the field cannot be successfully explained by an intergovernmental, rational-choice inspired approach.

<sup>46</sup> Which is not the same as saying that the judges were pressured to come up with a certain kind of decision, but were rather aware of the political climate and the balance of competences in matters of social benefits for migrants.

<sup>47</sup> Initially in *Brey* C-140/12 (2013).

FSC's reinterpretation of the ECJ ruling in the *Alimanovic* case counteracts the interest of the national government, thus suggesting that factors other than strategic calculus guide national judges in EU law disputes. Interestingly, the FSC decided to uphold the German constitutional value of life in dignity, suggesting that the domestic legal culture might have guided the final verdict. Besides these cultural/institutional factors, the preferences and value systems of individual judges could also inform the decision to reinterpret an ECJ preliminary ruling (cf. Davies, 2012: 85).

Three sets of conclusions can be drawn from this case study in regard to ECJ rulings and their domestic application in sensitive policy areas. Firstly, the ECJ has continued to deliver not overly activist judgments in the cases concerning EU migrants' access to the social benefit system of member states. The ECJ has been careful not to outstep its competences and has firmly reinforced Member States' exclusive competence to determine individual circumstances of applicants for social benefits. The Court has in no instance granted an unconditional right to equal treatment, but made sure to leave enough leeway for Member States to interpret what constitutes "*sufficient resources*", "*unreasonable burden*", "*genuine links*" or "*genuine chance*" when determining outcomes of residence and benefit claims. What may be considered as establishing "*legal uncertainty*" in a strictly juristic sense, might also be considered strategic behavior on the side of the Court so as not to intimidate national sovereignty and fiscal capacities, limit the caseload before national courts and the ECJ, or even spark legislative ret-

ributions on the EU level. Still, by upholding fundamental principles of freedom of movement and leaving enough room to challenge restrictive policies of access to benefits by EU migrants, the ECJ was able to balance between the interests of individuals and national governments. This development is in line with intergovernmentalist expectations that the ECJ will act in a self-constraining manner in salient policy areas with shared competences. The ECJ could not escape noticing the political and societal reactions to the perceived consequences of EU migrants' access to host countries social benefit systems. Therefore, the ECJ interpreted EU law sufficiently broadly<sup>48</sup> as to leave enough room for maneuver to member states to govern access to benefits relatively autonomously.

Secondly, the *Alimanovic* case demonstrates that the role of national courts in preliminary reference procedures is not static, and that ECJ rulings are not simply absorbed into the domestic level. On the contrary, national courts display enough judicial power to reinterpret ECJ judgments and significantly alter domestic policies even in very sensitive areas. Opposite to expectations, the FSC employed an activist interpretation of EU migrants' right to benefits, upholding the most fundamental principle of the German legal order – human dignity. The decision of the German Federal Court (GFC) to upgrade the ECJ ruling by adding one more safety net to EU migrants and by drawing both on obligations under international law and case law can hardly be explained by the theories of legal integration in European Studies or by inter-judicial conflict. From both standpoints, an initially activist and pro-

<sup>48</sup> Most notably by linking residence requirements to access to special non-contributory benefits, and qualifying them as "social assistance" as written in the Article 24(2) derogations to the principle of equal treatment in the *Citizenship directive* so that a link between the *Citizenship directive* and Regulation 883/2004 was established (Verschuere, 2014: 165).

integrationist ECJ judgment is taken for granted – a development that was not found in this case study. One possible explanation of FSC's behavior is that EU law indeed broadened the “*menu of policy choices*” for the judiciary (Stone Sweet 2010:30). Since the FSC might have predicted a cautious ruling by the ECJ, it could utilize the preliminary ruling to form the basis of the final and more nuanced verdict. A second, more plausible explanation would indicate that national legal norms, culture and international obligations do not simply vanish as a result of supremacy and the direct effect of EU law. Unlike any strategic, rational-choice explanation, this sociological notion would expect national courts to stick to fundamental principles of the domestic legal culture when implementing EU preliminary rulings. This is consistent with FSC's reliance on GFC's case law, but more profoundly in the reliance on the principle of “*human dignity*” enshrined in the *German Basic Law*. Hence, the GFC upheld one of the cornerstones of the German legal order. Finally, we might be witnessing a new development in the preliminary reference procedure in salient policy areas with shared competences. As some authors indicate (Verschuere, 2014; Verschuere, 2015; Zahn, 2015), ECJ case law<sup>49</sup> regarding social benefits increased legal uncertainty and widened the “margin of discretion” to national authorities (i.e. automatic expulsion in *Alimanovic*). National courts could therefore act as guardians of legal certainty and additionally reinterpret ECJ rulings so as to close the gap of legal uncertainty. In addition to the *Alimanovic* case, this explanation is corroborated by the *Brey case*<sup>50</sup> where the Austrian Supreme Court supplemented the ECJ ruling on a compensatory supplement (*Ausgleichzulage*)

by adding that the right to equal treatment under EU law in regard to non-contributory social benefits applies as long as the competent Austrian authorities do not decide to terminate the residence right.

Thirdly, and somewhat contrary to the second point, national courts will still have to adjudicate with the government in mind since the government could make recourse to a variety of instruments to defy an unfavorable ECJ/national court ruling. If faced with expansive ECJ interpretations, Member States can still obstruct a proper implementation of a ruling or investigate possibilities of revising domestic legislation in a manner that would not contradict EU law (Blauberger, 2012: 113). The German authorities exploited the opportunity offered by a series of favorable ECJ preliminary rulings to overturn FSC's reinterpretation, and revised social legislation so to solidify the barriers to entering the social assistance system for the citizens of other Member States. In effect, governments may circumvent the national court system and cherry-pick an ECJ ruling they wish to implement unilaterally.

## CONCLUSION

This paper attempted to contribute to the literature on judicial influence on public policy through the EU preliminary reference procedures in the field of access to social benefits. The recent activity of the ECJ in preliminary rulings on social rights of economically inactive migrant EU citizens reflects a deferential approach towards national political and economic (fiscal) interest. The gap in social rights between active and inactive EU migrants has widened, hence intensifying economic stratification, class differences and so-

<sup>49</sup> I.e. *Grzelczyk*, *D'Hoop*, *Collins*, *Bidar*, *Brey*, *Dano*, *Alimanovic* etc.

<sup>50</sup> For a detailed account and legal analysis of the *Brey case*, see Verschuere (2014).



cial exclusion (see: Bruzelius et al., 2017; Heidlmaier and Blauberger, 2017; Blanchet, 2016; O'Brien, 2016). The article hypothesized from an intergovernmental perspective on a policy issue with a long history of judicial-political contestation, contained compliance, legislative overrule and preemption. Even though the expectations of a cautious ECJ approach to issues of access to social benefits were met in *Dano*, *Alimanovic*, and *García-Nieto* alike, reactions of the German Social Court in the *Alimanovic* case do not match the assumption about non-activist judicial behavior in sensitive policy matters. Both the German and Austrian court did not challenge the ECJ rulings, but reinterpreted them in a more human rights-based direction that runs against the perceived interests of the national government, and possibly has wider implications for the application of the policy at issue.

The findings are an important reminder that the domestic legal culture and adherence to key principles (i.e. human dignity) can significantly alter the course of preliminary rulings or diminish/increase its impact. As long as the elements of the final verdicts are compatible with the supremacy and direct effect doctrines, and they do not counter the ECJ ruling, one cannot talk of non-implementation, but rather reinterpretation of the ruling in line with domestic legal traditions. A further policy implication of domestic courts' activism in EU matters is that lax and broadly interpretable EU law on EU migrants' access to social benefits is not a guarantee that domestic competences and authority will stay intact by ECJ proceedings in all cases. At times, depending on domestic circumstances and legal traditions, we may expect national courts to be the missing link that, on the one hand, overcomes ECJ's reluctance to apply exces-

sively activist interpretations in case law on important matters, and on the other hand establishes legal certainty in these matters. Having said that, the preliminary reference procedure might serve as a mechanism for the national judiciary to influence domestic public policy. Nonetheless, one should keep in mind that neither the ECJ's nor the national courts' jurisprudence is self-implementing (Conant, 2002) at the level of public administration. The *Alimanovic* case has shown that local authorities and governments that are discontent with a ruling, may reach for a different obstruction mechanism or revise domestic legislation, hence overturning judicial influence.

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### **Sažetak**

## **PRISTUP EUROPSKOG SUDA PRAVDE PREMA ZAHTJEVIMA EU MIGRANATA ZA SOCIJALNIM NAKNADAMA: PROCESNA ANALIZA SUDSKOG UTJECAJA NA SOCIJALNU POLITIKU NJEMAČKE**

**Mario Munta**

*Fakultet političkih znanosti, Sveučilište u Zagrebu  
Zagreb, Hrvatska*

*Cilj ovog rada je istražiti u kojoj mjeri Europski sud pravde (ESP) odluke o prethodnim pitanjima u području socijalnih naknada za ekonomski neaktivne migrante, državljane Europske unije (EU), donosi strateški, a u kojoj se mjeri nacionalni sudovi u tim područjima pokoravaju odlukama ESP-a. Rad pri tome nastoji doprinijeti boljem razumijevanju utjecaja sudstva na javne politike putem procedure prethodnih pitanja EU-a. Kako je područje socijalne politike izrazito konfliktno, ovaj rad pretpostavlja da će aktivnosti ESP-a u tome području u najvećoj mjeri odražavati strateško balansiranje između dublje EU integracije putem sudskih praksi i poštivanja nacionalnih (fiskalnih) interesa i nadležnosti. Autor poseže za interguvermentalnom teorijskom perspektivom racionalnog izbora i primjenjuje ju na primjeru Njemačke gdje su tri nedavna slučaja pristupa socijalnim naknadama (tj. posebnim nekontributivnim davanjima) upućena ESP-u na odlučivanje o prethodnim pitanjima (Dano C-333/13, Alimanović C-67/15 i García-Nieto C-299/14). Zaključci se temelje na rekonstrukciji političkih okolnosti, prethodne sudske prakse ESP-a, priloženih obrazloženja u slučajevima te konačne presude nacionalnih sudova.*

**Ključne riječi:** EU migranti; sustav socijalnih naknada; Europski sud pravde; prethodna pitanja; Alimanović; Dano; García-Nieto.